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NATURE OF STOCKHOLDERS' INDIVIDUAL LIABILITY FOR CORPORATION DEBTS.

The result reached in the case of *Risdon Iron & Locomotive Works* v. *Furness*,[1] decided by the English courts about three years ago, has received the approval of able commentators in several of the law reviews, American as well as foreign;[2] and, so far as the observation of the present writer goes, there has been no expression of disagreement. It is to be observed, however, that these writers do not profess to give more than a very brief review of the English case referred to; and, furthermore, it may be doubted whether there is to be found in any of the text-books a careful analysis of the specific problem of the case or an adequate discussion of the principles concerned. Yet the precise questions presented, involving as they do, the intrinsic nature of the liability of stockholders and the fundamental conceptions of the whole subject of foreign corporations and their control, are of compelling theoretical interest and great practical importance. Moreover there are, in the opinion of the writer, certain considerations and authorities[3] that suggest the possibility of a conclusion opposite to that reached by the English Courts. For these reasons he ventures to present his own views at some length.

The facts of the case before us are these: The defendant, a subject and resident of England, was a shareholder in the Copper King, Limited, a joint-stock company registered under the Companies Acts, 1862-1898. By its "Memorandum of Association" the

[1] L. R. [1905] 1 K. B. 304, before Kennedy, J.; affirmed L. R. [1906] 1 K. B. 49, by the Court of Appeal, Collins, M.R., Romer and Mathew, L.JJ.

[2] 6 COLUMBIA LAW REV. 45; 18 Green Bag, 105; 18 Harvard Law Rev. 452; 21 Law Quart. Rev. 105; 22 Id. 122; 1 Zeitschrift für Völkerrecht und Bundesstaatsrecht, 101, 107. The decision is, without discussion, cited as law in Westlake, Priv. Internat. Law (4th ed., 1905) 365; Dicey, Conflict of Laws (2nd ed., 1908) 470.

[3] Notably Pinney *v.* Nelson (1901) 183 U. S. 144.

liability of the shareholders was to be "limited by shares,"[4] and its principal object was to acquire, work, and deal in various sorts of mines and mining privileges *"in the United States of America, Australasia and elsewhere,* * * * to carry out all or any of the foregoing objects *in any part of the world,"* and "to do all such other things as are incidental or conducive to the attainment of the above objects." By the "Articles of Association" the directors were empowered "to do all such other things, and take such steps as may now or at any time become necessary *so as to comply with any statutory enactment, rule, or regulation in any country, colony or place where the Company may carry on business.* * * * "[5] A copy of the Memorandum and the Articles of Association was filed with the Secretary of State of the State of California in May, 1901, this being done pursuant to the requirements of the laws of that State.[6] The Copper King, Limited, in accordance with the authorization contained in the Memorandum and Articles, acquired and operated certain mines in California, and for the purpose of working those mines, by a contract made and to be performed in California, purchased on credit certain machinery from the plaintiff, a California corporation. The debt thus incurred not having been paid, and the Copper King, Limited, having become insolvent, the plaintiff brought an action in an English court to enforce the defendant's alleged proportional, individual liability arising under the laws of California.[7] Mr. Justice Ken-

[4]By the English Companies Acts, 1862-1908, it is provided as follows:
"38. In the event of a company formed under this Act being wound up, every present and past member of such company shall be liable to contribution to the assets of the company to an amount sufficient for the payment of the debts and liabilities of the company. * * *
"4. In the case of a company limited by shares no contribution shall be required from any member exceeding the amount, if any, unpaid on the shares in respect to which he is liable as a present or past member." See Buckley, Joint-Stock Companies (8th ed., 1902) 158.

[5]The italics employed in setting forth these extracts from the Memorandum and Articles of Association of the Copper King, Limited, are those of the writer. It may also be stated here, once for all, that the same is true as regards all italics used in quotations from judicial opinions, textbooks, or legislative enactments.

[6]Act of March 8, 1901 (since the year 1905 incorporated in Cal. Civ. Code as sections 408-410).

[7]Cal. Const., Art. XII., section 15: "No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."
Cal. Const., Art. XII., section 3: "Each stockholder of a corporation or joint-stock association shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned

nedy held, as a matter of law, that the plaintiff was not entitled to recover, and this decision was affirmed by the Court of Appeal.

The questions of most immediate interest suggested by the facts of this case are those relating to the conflict of laws. Any adequate discussion of these questions, however, would necessarily be difficult, if not impossible, unless it were preceded by a careful consideration of the intrinsic nature of stockholders' liability whether "corporate" or "individual." If it be possible to reach some common understanding as to this important preliminary matter, viewed entirely apart from any preconceptions or prejudices derived from the conflict of laws, then, and then only, it would seem, can there be any hope of agreement upon those questions that are of primary interest to us. Accordingly it is proposed to treat the subject in two parts: I. The nature of the individual liability of stockholders to the creditors of the corporation; II. The individual liability of stockholders in relation to the conflict of laws. The first part is presented in this article; the second is reserved for another article soon to appear in the pages of this Review.[8]

There are various modes by which, under the law, a man may enjoy the benefits of property or engage in business transactions with others,—being subject in all cases, of course, to corresponding burdens or duties. A few familiar examples may not be out of place: An individual, X, may in person contract with A; or, likewise in person, he may with Y enter into a joint or joint and

by him bears to the whole of the subscribed capital stock or shares of the corporation or association."

Cal. Civ. Code, section 322: "Each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock. * * * Any creditor of the corporation may institute joint or several actions against any of its stockholders, for the proportion of his claim payable by each, and in such action the court must ascertain the proportion of the claim or debt for which each defendant is liable, and a several judgment must be rendered against each, in conformity therewith. * * * *The liability of each shareholder of a corporation formed under the laws of any other state or territory of the United States, or of any foreign country, and doing business within this state, shall be the same as the liability of a stockholder of a corporation created under the constitution and laws of this state.*"

It is interesting to note that a somewhat similar law relating to the liability of shareholders in a foreign corporation exists in Idaho. See, for a copy of this statute, Beale, Foreign Corp. (1904) 509.

[8]The limitations upon the scope of this first article, its points of emphasis, and, indeed, its *raison d'etre* can be best understood only if it be remembered that its primary purpose is to serve as a foundation for the second article dealing with the liability of stockholders as a problem in the conflict of laws.

several obligation toward A. So also X may be the owner of property in severalty, or as tenant in common, or as joint tenant; and instead of being the legal owner, he may, in all these cases, enjoy the benefits of property as a *cestui que trust.* Further, if M, the agent of X, enters into a contract with A in behalf of X, the latter himself will incur a so-called contractual obligation even though he may be thousands of miles away at the time of the actual agreement between M and A and, ordinarily, even though X's name may not have been disclosed to A. Finally, by becoming a partner of Y and Z, X may incur any of the usual partnership obligations or liabilities toward third parties. All these cases, as indicated at the outset, merely exemplify some of the different modes by which individuals can have legal benefits and burdens as regards others.

Strangely enough, it has not always been perceived with perfect clearness that transacting business under the forms, methods and procedure pertaining to so-called corporations is simply another mode by which *individuals* or *natural persons* can enjoy their property and engage in business.[9] Just as several individuals may transact business collectively as partners, so they may as members of a corporation—the corporation being nothing more than an association of such individuals. It is true that, as conditions precedent to acquiring, on the one hand, "corporate" legal powers, rights and privileges (or liberties) and, on the other hand, "corporate" legal disabilities, duties and liabilities,[10] such natural per-

[9]This, it may be emphasized, is not intended as a mere "theory" of corporations differing from certain other so-called theories; it is believed to be an *ultimate fact* which, for the sake of clear thinking, all should constantly recognize, however much they may differ as to the practical and legal consequences of that fact.

The necessity of emphasizing, for the purposes of this article, the realities of corporate forms, methods and procedure and of looking beneath the fictional language tending to obscure those realities seems evident if we notice the reasoning of Romer, L.J., in the case before us, Risdon Iron, etc., Works *v.* Furness, L. R. [1906] 1 K. B. 49, 59; "I need hardly point out that the shareholder and the company are different entities, * * * If the shareholder and the company are treated as different entities the plaintiffs cannot by law enforceable in this country say that the company, trading in California, must, though without authority from the shareholder, nevertheless be held to have contracted so as to make him liable."

Compare also the language of Professor Josef Kohler of Berlin, in 1 Zeitschrift für Völkerrecht und Bundesstaatsrecht, 107, approving the Risdon case.

[10]For a valuable exposition and discrimination of these terms and the conceptions involved—some of them too often confused with one another,—see Salmond, Jurisp. (2nd ed., 1907) 190-196; compare Terry, Com. Law (1906) 150-153.

sons must execute and file so-called articles of incorporation, or, as the instrument is called in England, a memorandum of association. But so too before a man can, in any ordinary case, become bound by the acts of his agent, it is a condition precedent that he shall have constituted some one his agent; and, likewise, before individuals can hold property or engage in business as partners, it is obviously a condition precedent that they shall have organized by entering into a partnership agreement. The conditions precedent to having rights, etc., and transacting business as members of a corporation may be more numerous and more elaborate; but their essential character is, from our present point of view, not at all different.[11]

When all is said and done, a corporation is just an association of natural persons conducting business under legal forms, methods and procedure that are *sui generis*. The only conduct of which the state can take notice by its laws *must* spring from natural persons[12]—it cannot be derived from any abstraction called the "corporate entity." To be sure, the conduct of those individuals will be different when they are coöperating in their collective or corporate projects than when they are acting independently of one another—in a word, the "psychical realities" [13] will be different;

[11]Whenever, as is said, a "charter" is granted to the corporators by special legislative act, the essential character of the corporate organization, corporate privileges, etc., is of course not at all different from what it is when individuals incorporate under general enabling laws such as the Companies Acts of England and the corporation laws of the American states. In the former case matters are worked out as the result of a *special* law; in the latter and more usual case everything results from *general* permissive laws.

Compare Professor J. N. Pomeroy, 19 Am. Law Rev. 115 (quoted): "The common law conception of the 'legal personality' of the metaphysical entity constituting the corporation, entirely distinct from its individual members, arose at a time when corporations were all created by special charters generally granted by the Crown; when very few of them were 'stock' corporations; when they were mostly perpetual in existence; when absolutely no personal liability was imposed upon the individual corporators * * * and when corporations were in reality, as a necessary result from this creation and legal position, monopolies."

[12]Compare Professor E. H. Warren, Collateral Attack on Incorporation (1908) 21 Harv. Law Rev. 305: "A human being is, in the nature of things, a unit. A philosopher might entertain a doubt upon this,—*homo* might seem to him merely a convenient word by which to designate a large number of molecules. But the common law judges seem never to have doubted."

[13]This term is suggested by an interesting article from the pen of a well-known author: W. Jethro Brown, The Personality of the Corporation and the State, (1905) 21 Law Quart. Rev. 365. While these "psychical realities" should be recognized, it may be doubted whether, as a consequence of that fact, it is necessary or desirable to expound the nature of a corporation, as does Professor Brown, in terms of the alleged "real char-

but ultimately the responsibility for all conduct and likewise the enjoyment of all benefits must be traced to those who are capable of it, that is, to *real* or *natural* persons.[14] When, therefore, in

acter of corporate personality" and the alleged "distinction between a corporation and the sum of its members," etc. The present writer must confess that to him this seems to involve either an erroneous statement of the facts or else, as is more likely, a dangerously confusing use of terms. See the next note.

[14]The limitations upon the scope of this article do not permit of any exhaustive discussion of the nature of a corporation. In order, however, to avoid possible misunderstanding, it may not be amiss to amplify some of the ideas already expressed, even at the possible expense of some repetition:

Quite consistently with anything thus far stated, it is of course possible, as a mere matter of words and definitions, to say, even with an intention to speak *literally,* that the association of natural persons is itself a person—a "legal" or "juristic" person. But doesn't this do some violence to the vocabulary? The generic term *person* thus acquires an unfortunately wide and peculiar denotation and a somewhat muddled connotation hardly consistent with our usual modes of thought and speech. Is it not like calling a drove of horses a horse or a deck of cards a card? This arbitrary mode of definition by enlarging the generic scope of a term is possible, but hardly useful. The law is constantly suffering from a loose, undiscriminating, and misleading terminology; and, in the opinion of the present writer, this is particularly true of the law of corporations.

The difficulties of definition and the possibilities of confusion increase rapidly if, *with an intention to speak literally,* we assert that this juristic person has a capacity for rights, is subject to duties, enters into contracts, etc. This mode of description is possible; but, if scientific accuracy is to be preserved, it involves the necessity of defining all these terms accordingly. Thus the term *right* would have to be used in a generic sense broad enough to denote the right of a natural person and also the so-called right of the so-called juristic person. The difficulty of doing this in any intelligible way may be illustrated by comparing two passages from Holland, Jurisp. (10th ed., 1906) 79, 93: "We may therefore define a 'legal right,' in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others." (Note the word *man.*) "Artificial, conventional, or juristic persons, are such groups of human beings * * * as are in the eye of the law capable of rights and liabilities * * *" (Note the words, *in the eye of the law.*)

In reality when we say that the so-called legal or juristic person has rights or that it has contracted, we mean nothing more than what must ultimately be explained by describing the capacities, powers, rights, privileges (or liberties), disabilities, duties and liabilities, etc., of the natural persons concerned or of some of such persons. Suppose we consider, *e. g.,* a so-called contract made by a corporation as the result of a majority vote of the stockholders in regular meeting. The real nature of this transaction can be adequately understood only if, looking beneath the ordinary language and forms, we observe that the net result is the consequence of the concurrent exercise of the individual legal powers of the respective stockholders. Thus, if there are fifty stockholders, each holding one share, and if thirty vote for the contract and twenty against it, and if, in accordance with this vote and authorization, the corporation agent executes the contract with the third person, then all of the fifty stockholders become bound. As a consequence of the concurrent exercise of the legal powers of the thirty, in oposition to a similar concurrent exercise of the legal powers of the twenty, an obligation is fixed ultimately upon the latter as well as upon the former. This may show, as it seems to the writer, that

accordance with the customary terminology, we speak of the corporation, as such, as contracting in the corporate name, as acquiring, holding and transferring property, and as suing and being sued, and when we speak of stockholders as mere claimants against the corporation, holding stock, which is a species of personal property, —and so on indefinitely—we are merely employing a short and convenient mode of describing the complex and peculiar process by which the benefits and burdens of the corporate members are worked out. If, for example, we say that XYZ, a corporation, has entered into a certain contract with A, we mean that, as to form and procedure, this transaction has been carried out *as if* the XYZ association of individuals were a single person having XYZ as his name. Similarly, it is no doubt true, according to a number of decisions,[15] that a perfect *legal* title to land cannot be transferred merely by all the stockholders' joining in a conveyance. This obviously does not indicate that the stockholders as such are not the exclusive holders of the legal rights, powers, liberties, etc., relating to that land: it shows merely that the form and method of transferring title to this particular land is different from that which would be sufficient if, *e. g.*, the owners were ordinary joint tenants or tenants in common. The transfer must, in accordance with the forms prescribed by law, be made *as if* the corporation

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the obligation is quasi-contractual rather than contractual. But the fact that the transaction results from the unified action of the stockholders hardly makes it necessary or desirable that the association of natural persons should be called a person with a "real personality." As well might we say that thirty men lifting a heavy iron rail should be called a "person," or that ten horses drawing a single load should be designated as a "horse."

Doesn't this roundabout process of explanation necessitated by calling the association a juristic person suggest the same objection that has been made concerning a certain other legal fiction? Is it not like looking at things through smoked glass and then holding a candle on the other side in order to see them? If this be so, it appears even more objectionable to speak of a corporation as an abstract entity or personality distinct from the sum of the stockholders. Is it not better, then, as a matter of words and definitions, to say with emphasisis that, as applied to associations of natural persons considered as units, the terms, *right, duty, contract,* etc., should never be used except in a figurative sense,—that is, as a sort of legal shorthand? Compare Austin, Jurisp. (5th ed., 1885) 354: Legal persons "are persons by a figment, and for the sake of brevity in discourse. All rights reside in, and all duties are incumbent upon, physical or natural persons. But by ascribing them to feigned persons, and not to the physical persons whom they in truth concern, we are frequently able to abridge our descriptions of them."

[15] *E. g.*, Parker *v.* Bethel Hotel Co. (1866) 96 Tenn. 252, 34 S. W. 200; See also 1 Mor. Priv. Corp. (2nd ed., 1886) sec. 233. But an equitable title may, of course, pass in certain cases. See Bunday *v.* Iron Co. (1882) 38 Oh. St. 300, 311. Compare Williston. History of the Law of Business Corporations before 1800. (1888) 2 Harv. Law Rev. 149-152.

were itself a single natural person owning the land and acting through certain representatives. In short, corporate "ownership" is *sui generis;* and the form and method of conveyance are likewise *sui generis.*[16]

The importance of having these seemingly obvious truths as to the nature of a corporation somewhat vividly before us, preparatory to the discussion to follow, will perhaps justify a quotation of one of the best judicial utterances on the subject. In *Cincinnati Volksblatt Co.* v. *Hoffmeister,*[17] Mr. Justice Spear said:

"The idea that the corporation is an entity distinct from the corporators who compose it, has been aptly characterized as 'a nebulous fiction of thought' * * * For the purpose of description and defining corporate rights and obligations, and characterizing corporate action, the fiction that the corporation is an artificial person or entity, apart from its members, may be convenient and possibly useful, but in the opinion of the writer the argument favoring the essential separate entity of the corporation fails, and it is believed that the effort has resulted in misleading conceptions and in much confusion of thought upon the subject. When all has been said, it remains that a corporation is not *in reality* a person or thing distinct from its constituent parts, and the constituent parts are the stockholders, as much so in essence and in reality as the several partners are the constituent parts of the partnership."

If the ideas thus far expressed be sound, it must follow that all corporate transactions and all propositions relating to the law of corporations can be stated in terms of ultimate realities rather than in terms of the fictions more commonly employed; and, as we are now concerned more particularly with the fundamental character of the liabilities of stockholders resulting from corporate transactions, an attempt must be made to describe these liabilities without employing the descriptive formula of corporate personality. Perhaps, however, a better understanding and agreement as to terms and conceptions can be had if, as a preliminary matter, certain simpler cases of liability are analyzed and discussed. With this object in view, it seems best to consider: (1) The liability arising from a contract made by one natural person with some other natural person; (2) The liability arising from a contract made by a number of natural persons with some third person,—the parties first mentioned being either partners or members of an

[16]So the mode by which a stockholder transfers his individual interest in the corporate assets is *sui generis:* transferring his "shares of stock."

[17](1900) 62 Oh. St. 189, 200, 56 N. E. 1033, 1035.

unincorporated joint stock company; (3) The liability of stockholders arising from a contract made "by a corporation" with some third person.

(1) *The liability arising from a contract made by one natural person with some other natural person.*—Suppose that on March 1st an agreement is made whereby, in consideration of X's promise to sell and deliver ten tons of ordinary coal to A on June 1st, the latter undertakes to pay X on that date the sum of fifty dollars. The entire legal relation—the *vinculum juris*—resulting from that agreement may be called a primary, contractual obligation.[18] If the elements of this obligation be considered, it is evident that A has a primary, or antecedent, contractual right to receive the coal from X, and the latter is under a primary, contractual duty to sell and deliver the coal to A. So also, of course, X has a right, and A has a corresponding duty, relating to the money to be paid by A.

Let it be assumed, however, that X, without excuse, fails to perform his duty by delivering the coal to A on June 1st. In such case a new legal relation—a secondary, or remedial, obligation—arises between A and X. The latter, as a consequence of the breach of his primary duty, is now under a remedial duty to make *non-specific* reparation, that is, a duty to pay to A damages amounting to the difference between the market and the contract price of the coal, say ten dollars; and, correspondingly, A has a remedial right. If X had contracted to convey land, he would, after his breach, be under a remedial duty to make *specific* reparation, *i. e.*, to convey the land to A. So too, if X were under a primary duty, by way of debt, to pay a sum certain to A, on failure to pay he would incur a remedial duty to make specific reparation to A, that is, to pay the very sum of money called for by the primary duty, and possibly also interest. In this case the fact that the reparation is specific is, of course, a mere coincidence. Furthermore, in this case, as in that relating to the coal, X's remedial duty is to pay the damages out of whatever assets he may have.

If X fails to act under his remedial duty, A has *ab initio* the

[18]The term *obligation* is used in three different senses: (1) to denote the entire relation between the obligor and the obligee, as in the present article; (2) to denote the duty of the obligor, as in the sentence: "He is under a legal obligation;" (3) to denote the right of the obligee, as in the sentence: "A transfers his obligation." In the present article the term is used almost always in the first of these senses; but occasionally, as the context will show, the meaning shades over into the second sense above outlined.

power, by action in the courts, to institute a process of compulsion against X. At this point, we reach, as the correlative of the power of A, the liability of X.[19] This liability is called contractual, for the reason that it results from a breach of a primary contractual duty. The liability is unlimited, for of course there is no arbitrary limit either as to the amount of damages to be forced out of X or as to the funds or assets from which the damages may be realized. In short, X is liable to make satisfaction out of his general substance to the amount determined by the general rules of law. The steps in this process of compulsion must now be considered. If A brings an action for damages, and the tribunal pronounces in his favor, the remedial obligation between A and X is discharged by, or, in legal terms, "merged in," the new legal relation or *vinculum juris* that results,—a judgment obligation. X is now under a judgment duty, and his liability—"the ultimatum of the law"—now becomes even more threatening. At this point, in most common law jurisdictions A has a choice. First, he may, if he desire, bring a new action based on X's breach of his judgment duty;[20] and this proceeding will terminate by a merger of this first judgment obligation in a new judgment obligation. Second, A may secure that which is specific performance or, perhaps more accu-

[19]Compare Salmond, Jurisp. (2nd ed., 1907) 195, 323: "The most important form of liability is that which corresponds to the various powers of action and prosecution arising from the different forms of wrong-doing. * * * Liability in this sense is the correlative of legal remedy." "Liability or responsibility is the bond of necessity that exists between the wrong-doer and the remedy of the wrong. This *vinculum juris* is not one of mere duty or obligation; it pertains not to the sphere of *ought* but to that of *must*. * * * A man's liability consists in those things which he *must* do or suffer, because he has already failed in doing what he *ought*. It is the *ultimatum* of the law."

Compare also Harrison, J., in Lattin *v.* Gillette (1892) 95 Cal. 317, 319; "The word 'liability' is the most comprehensive of the several terms" (contract, obligation, liability) "* * * inasmuch as it is the condition in which an individual is placed after a breach of his contract, or a violation of any obligation resting upon him * * * the liability arises immediately upon such breach of contract or disregard of duty, and an action * * * may be immediately maintained."

No doubt we frequently use the term, *liabilities* in a much broader, though less appropriate, sense so as to include many other forms of legal burden or disadvantage. Thus, quite as often as not, when we speak of ordinary contractual liabilities, we intend the term to mean either the primary duties resulting from a contract or, possibly, the remedial duties springing from the breach of the primary contractual duties. It is perhaps true that as a rule this lack of precision is not of serious consequence; but it can hardly admit of doubt that, in any discussion relating to the conflict of laws, the nice discrimination of terms and the ideas underlying them may be of the utmost importance.

[20]2 Freeman, Judgments (4th ed., 1898) sec. 432.

rately, specific reparation as to his original judgment, *i. e.,* satisfaction by levying execution against X's property. Since X's liability has been unlimited at all stages, as above explained, of course execution may be had out of whatever assets X has, unless subject to some exemption by the general provisions of the law. If, in contrast to the case just discussed, X, by breach of contract, is under a remedial duty to convey land, instead of to pay money, the judgment or decree constitutes a new obligation, performance of which usually results by virtue of the sanction of imprisonment—the normal weapon of a court of equity.

It is hardly necessary, except for continuity of discussion, to emphasize at this point the elementary proposition that, by a contract made with A by X's duly authorized agent, X may, either as disclosed or as undisclosed principal, incur primary duties, remedial duties, and liabilities similar to those just described as resulting from a contract made by X in person.

(2) *The contractual liability of partners or shareholders in an unincorporated joint-stock company.*—Carrying the discussion a step further, let us now assume that X, Y and Z, as partners or as shareholders in an unincorporated joint-stock company, have, by act of their agent, made a contract with A, or incurred a debt in his favor. In such a case X, Y and Z have joint, primary, contractual duties, and, in case of breach, joint, remedial, contractual duties and liabilities. It is obviously unnecessary to carry out a detailed analysis as in the preceding paragraphs; but, for the purpose of subsequently contrasting the liabilities of stockholders in a corporation, it seems desirable to have in mind all the essentials of partnership obligations and liabilities as given in the language of Professor Mechem:[21]

"The liability may be *joint,* but it is also *entire.* Each partner, therefore, is personally and individually liable for the entire amount of all such obligations, * * * This liability, in ordinary partnerships, is not limited by the amount of his contribution to the partnership capital, but extends to his entire property; and it makes no difference what may be his share or interest in the partnership business, or whether he is an active or secret partner, or whether the other partners are responsible or not; he is liable *in solido* for the partnership obligations.

"Moreover, if judgment be obtained against the firm upon an obligation existing against it, the execution, though in form against all, may, unless otherwise provided by statute, be levied directly upon the individual property of any one or more of the partners

[21] El. Partn. (1899) secs. 214, 215.

without regarding or exhausting the firm property. The creditor, further, is under no obligation to levy against all the partners ratably, but may select any one or more and levy execution against him or them until the judgment is satisfied, leaving all questions of contribution to be settled afterwards between the partners themselves."

For present purposes it can hardly be too strongly emphasized that all these essentials as to unlimited liability apply not only to ordinary partners, but also to shareholders in an unincorporated joint-stock company. This is true although such shareholders may be very numerous, and even though they may in fact have but little to do with the management of the business.[22]

It is frequently said, however, that the liability of partners or shareholders may be limited by agreement with the creditor. The limits of space do not permit of an exhaustive discussion of this interesting subject. But it seems desirable merely to touch on some of the more important doctrines as established by the English cases, since they shed great light on the nature of the limited liability of the stockholders in an ordinary American corporation or the shareholders in the usual English limited company, such as the "Copper King, Limited." When the cases commonly cited for the above proposition as to limitation of liability are examined, it becomes evident that there is some ambiguity of terms, and hence a need for discrimination. Does the proposition refer (a) to the limitation of the shareholders' primary duties only, or (b) to their remedial duties and liabilities resulting from a breach of the primary duties? Each of these possible cases may be considered in turn.

(a) So far as the primary duties are concerned, two sorts of attempts to limit responsibility have been considered by the courts. One of these consists of an express agreement by the shareholders *inter se* that each shall be ultimately liable only to the amount of his share in the joint funds or in the capital stock of the enterprise. It is well-settled that such an agreement *per se* has no effect upon the scope of their primary duties to the creditor;[23] and, according

[22]See Hallett *v.* Dowdall (1852) 18 Q. B. 2, 51; Greenwood's Case (1854) 3 De G. M. & G. 459, 476; Imperial Shale Brick Co. *v.* Jewett (1901) 169 N. Y. 143, 150; Carter *v.* McClure (1897) 98 Tenn. 109, S. C. Burdick, Cas. Partn. (2nd ed.) 37. Compare Professor F. M. Burdick, Are Defectively Incorporated Associations Partnerships? (1906) 6 COLUMBIA LAW REV. 1.

[23]See, in addition to the cases of the preceding note, The King *v.* Dodd (1808) 9 East 516, 527; Walburn *v.* Ingilby (1833) 1 M. & K. 61, 76; Baird's Case (1870) L. R. 5 Ch. App. 725, 733.

to high authority, this is true even though the creditor has notice of the agreement.[24] The other attempt by shareholders to limit the scope of their primary contractual duties involves an actual agreement with the creditor. For example, an unincorporated insurance company issues a policy whereby, *prima facie,* the members of the company jointly contract to pay the amount of the loss, etc., but expressly stipulate,

"that the capital stock and funds of the said Company shall alone be liable to answer and make good all claims and demands whatsoever under or by virtue of this policy." [25]

It seems clear from the authorities, English and American, that such stipulation is effective as a limitation of the scope of the shareholders' promise and the resulting joint, primary duties: the promise and the obligation are thereby made conditional on the sufficiency of the "joint funds" [26]—the latter including, for this purpose, not only funds actually available but also any balance remaining unpaid on the shares of stock of the members bound by the policy. But let us now assume that, at the time a loss occurs under the policy, there are sufficient funds and yet, in breach of the joint primary duties of the shareholders, the insured's claim is not satisfied. What about the remedial right of the insured and the remedial duties and liabilities of the shareholders? By reason of these duties and liabilities are they bound to respond out of the "joint funds" only, or may each shareholder, after joint judgment, be compelled to satisfy the claim out of any assets he

[24]See Greenwood's Case (1854) 3 De G. M. & G. 459, 476; *Ex parte* Meredith's Claim (1863) 1 N. R. 510; Lindley, Companies (6th ed., 1902) 355; Pollock, Dig. Partn. (8th ed., 1905) 43. Compare also Hess *v.* Werts (Pa. 1818) 4 S. & R. 356. In Greenwood's Case, *supra,* Lord Cranworth said: "That doctrine does not depend upon the persons dealing with the partners having notice, and any notice would be quite immaterial, for creditors would only know what engagements the partners had made between themselves, whereas the rights of creditors are wholly extrinsic of any such engagements. If the deed of partnership, containing such a provision as I have mentioned, were hung up in the shop, it would make no difference. * * *"

[25]Extract from the insurance policy under consideration in Hallett *v.* Dowdall (1852) 18 Q. B. 2, 25. The purpose of this article and the limits of space do not warrant a full statement and discussion of this important case, which covers ninety pages in the report. It is, however, worth very careful study.

[26]Hallett *v.* Dowdall, *supra,* (judgment on demurrer); see also Andrews *v.* Ellison (1821) 6 Moore, 199, 206; Dawson *v.* Wrench (1849) 3 Ex. 359, 361; Reid *v.* Allan (1849) 4 Ex. 326, 334; Hess *v.* Werts (Pa. 1818) 4 S. & R. 356, 361.

may have? That the latter alternative represents the law is not questioned.[27]

(b) This being so, it becomes necessary to consider, as outlined above, the second meaning in which the expression "limitation of liability" may be used: May the shareholders by any form of actual agreement with the creditor limit the remedial duties and liabilities springng from the breach of their joint, primary duties to pay out of the "joint funds" of the company? Suppose it were expressly stipulated in the insurance policy already considered that, upon breach of the joint primary duties, each shareholder should be liable to respond not from his general assets, but from certain special assets only, viz., his interest in the joint funds or capital stock of the company.[28] It is probable that this was the real purpose and meaning of the language used in the policy considered at such great length in *Hallett* v. *Dowdall*:[29]

"and that no proprietor of the said Company * * * shall be in anywise subject or liable to any claims or demands, nor be in anywise charged by reason of this policy, beyond the amount of his or her shares in the capital stock of said Company. * * *." [30]

In this carefully considered case, however, all the judges that addressed themselves to the particular question agreed that, on the assumption that the primary duties of the shareholders should be regarded as joint, the attempted limitation of the secondary or

[27]See the authorities cited in the preceding note.

[28]Compare the language of Martin, B., in Hallett *v.* Dowdall (1852) 18 Q. B. 2, 57: "In reality it is an agreement to perform a contract, with a proviso, that, in the event of a breach, the payment to be made in respect of it shall be made by each contractor separately, and be so much, and no more."

[29](1852) 18 Q. B. 2, 25. The language here given follows that quoted from the same case, *ante*, p. 297.

[30]Compare the similar language in the insurance policy appearing in Hort's Case (1875) L. R. 1 Ch. D. 307, 310; also the interesting comment of James, L.J., p. 320: "They (the shareholders) were an unincorporated body of persons, but although they were in point of law and in point of fact not absolutely a corporation, it is quite clear that, as between all the parties to these deeds of settlement, it was their intention to make themselves for all practical purposes as like a corporation as in the then state of the law was possible to be done by a mere contract. * * * Nobody effecting a policy of insurance with such a society as this ever intended to be left * * * to the necessity of bringing an action against the survivors of the individuals who happened to constitute the particular body of persons on the day on which his policy was signed. The intention was that it should be a bargain with a *quasi* corporation, and a liability against the *quasi* corporation and against the persons who at the time when the policy ripened into a *debitum* would be the persons to provide for it."

remedial duties and liabilities was "repugnant" and "void."[31] Consistently with this view, two of the judges of the Exchequer Chamber, Cresswell, J., and Williams, J., held that all the shareholders were bound by a joint primary obligation conditioned on the sufficiency of the capital stock or funds, and hence were jointly liable in the action instituted against them. The majority, however, in order not to defeat the *dominant* intention of the shareholders as to limitation of liability, held that the policy should not be interpreted so as to establish either a *joint,* primary obligation or a *several,* primary obligation to pay the insured the amount of his loss out of the "joint funds" in case they were sufficient; that, in accordance with this view, even though, for any reason, the insured was not paid the amount of his loss, the shareholders did not thereby become subject to any unlimited remedial obligation or liability; that *at most* each shareholder had incurred a several, primary obligation to pay the insured, in case of loss, an amount not exceeding the sum remaining unpaid on the shares of such shareholder;[32] that, accordingly, any shareholder who had fully

[31]Williams, J., (1852) 18 Q. B. p. 68: "If such a (joint) contract contains stipulations restraining the necessary legal consequences of it, they must be rejected as impracticable in law. * * *"

Parke, B., p. 87: "* * * we must reject it as repugnant and void, as an attempt by the parties to do what by the law of *England* they cannot, contract jointly, with a separate limited liability to damages for the breach of that contract."

See also Martin, B., p. 55; Cresswell, J., p. 79.

Compare Duncan, J., in Hess *v.* Werts (Pa. 1818) 4 S. & R. 356, 364: "On the second question, the personal responsibility, I know not of any power, but that of the legislature, that can create a corporation; yet if these associations can contract debts, without a personal responsibility, payable only out of their joint funds, they possess all the powers and privileges of a corporation; they are *quasi* a corporate body. What is the judgment to be? what the execution? Can they be called on to enter special bail? * * * Are they the subjects of execution of the person? On every suit is there to be an inquiry into the amount of their joint funds, and judgment taken for that amount, a kind of judgment *de bonis,* or judgment *quando acciderint?*"

[32]Martin, B., alone expressed a definite opinion that each shareholder had incurred this sort of obligation (18 Q. B. p. 55); and it is difficult to say whether the views of the other judges constituting the majority were in accord. (See Talfourd, J., p. 61; Alderson, B., pp. 81-82; Parke, B., p. 91; Platt, B., p. 72, the judge last named, expressing a serious doubt as to the existence of such a several obligation.)

Compare Grain's Case (1875) L. R. 1 Ch. D. 307, 322, *per* Lord Justice Mellish: "It was held by the Exchequer Chamber, in the case of *Hallett* v. *Dowdall,* that under a clause of that description no action at law could be maintained against the shareholders jointly, because the provision that each proprietor was only to be liable to the extent of his own share in the capital stock was inconsistent with the joint liability at

paid up had no further responsibility whatever. The question at once arises: What if all the shareholders had fully paid up their shares and the "joint funds" were not applied to the payment of the insured's claim, even though such available funds were ample? There are more or less definite intimations by the majority judges that the three shareholders who, as directors, had signed the policy in behalf of the company had subjected themselves to a joint, primary obligation to see that the funds, in case they were sufficient, were properly applied to the discharge of the insured's claim.[33] In view of this case of *Hallett* v. *Dowdall* and the other related authorities, it may well be doubted whether in any ordinary case the insured had an entirely adequate remedy at law; and the conclusion seems warranted that his really effective and comprehensive remedy was to be sought by a suit in equity for the purpose of compelling the application of the available "joint funds" and, in case of insufficiency, requiring the shareholders to pay up the amount still due on their respective shares.[34]

From this brief review of the English common law relating to limitation of liability, it becomes evident that when business was done in behalf of an association of individuals, however large, unlimited primary duties and unlimited remedial duties and liabilities were the characteristic and usual results. As said by Professor Burdick, there is "the rule, everywhere recognized, that at common law, 'there is no intermediate form of organization be-

law. *One or two of the judges in that case who were in the majority did throw out an opinion that possibly a separate action might have been maintained against each proprietor, but I think that, on carefully studying the case, it will appear that a majority of the judges were not of that opinion.*" Compare also the comments of Wood, V.-C., in Durham's Case (1858) 4 K. & J. 517, 522.

It is hardly necessary to add that the technical terms used by the present writer in discussing Hallett *v.* Dowdall do not represent the language of the court; those terms are intended merely to state the views of the judges according to substance and effect.

[33]Only one judge, Martin, B., expressed a fairly positive opinion to this effect, 18 Q. B. p. 54; see, in accord, Alderson, B., pp. 82-83, *semble;* Talfourd, J., p. 62, *semble;* Platt, B., p. 72, *semble.* Parke, B., p. 92, expressly reserved his opinion. Compare, in accord with the view of Martin, B., Andrews *v.* Ellison (1821) 6 Moore, 199; Dawson *v.* Wrench (1849) 3 Ex. 359. See, however, the comments of the two dissenting judges in Hallett *v.* Dowdall; Williams, J., p. 67; Cresswell, J., p. 79. It seems difficult to escape from their reasoning on the present point.

[34]Compare Alchorn *v.* Saville (1820) 6 Moore, 202, 203, n; Talbot's Case (1852) 5 De G. & S. 386, 393; Law *v.* London, etc., Co. (1855) 1 K. & J. 223, 228; Durham's Case (1858) 4 K. & J. 517, 522; Grain's Case (1875) L. R. 1 Ch. D. 307, 312, *supra;* 1 Lindley, Companies (6th ed., 1902) 361.

tween a corporation and a partnership' "[35] In view of this principle there were only two methods by which shareholders in a joint-stock company might seek to escape unlimited responsibility. The first sort of attempt, that of actual agreement, was possible only by getting the assent of each creditor; and even then, the possibility of success, as has been seen, was subject to all the difficulties and qualifications already touched on. This effort at limitation could hardly have been thought satisfactory to both shareholder and creditor. The other method of seeking limitation of liability, that of incorporation, was not possible as a matter of common right until a comparative recent date.[36] Previously thereto an association could become a "limited liability" corporation only by special Act of Parliament or, without such Act, by special charter from the Crown.[37] At the present time, under general permissive laws, individuals may, by complying with certain conditions precedent, transact business subject to a more or less rigorous limitation of liability. In this way we reach the third kind of liability heretofore suggested for consideration.

(3) *The liability of stockholders arising from a contract made "by a corporation" with some third person.*—If the preceding discussion has served its purpose, it is now possible, with greater agreement as to terms and ideas relating to the subject, to consider more closely the nature of the liability of stockholders to corporation creditors. At the very outset it must of course be recognized that, as far as "limitation of liability" is concerned, there are many different classes of associations or corporations.[38]

[35]Are Defectively Incorporated Associations Partnerships? (1906) 6 COLUMBIA LAW REV. 1, citing Ricker *v.* American Loan & Trust Co. (1885) 140 Mass. 346, 348. Compare also Prof. W. D. Lewis, The Liability of the Undisclosed Principal in Contract (Feb., 1909) 9 COLUMBIA LAW REV. 116, 128: "This rule is the fundamental one which underlies all the liability which our common law imposes on one man for the acts of his business associate, whether that associate is his agent, his partner, or the director of the corporation in which he is a stockholder. The rule is this: One who has ownership in and control of a business is personally liable, unless that liability is limited by statute, for acts done in the course of and for the business."

[36]Stat. 18 & 19 Vict. c. 133. For the history of the English Acts relating to incorporation, see Oakes *v.* Turquand (1867) L. R. 2 H. L. 325, 358-363, *per* Lord Cranworth; see also Lord Colonsay, *Ibid.*, p. 374; F. Evans, The Evolution of the English Joint-Stock Limited Trading Company (1908) 8 COLUMBIA LAW REV. 339, 461.

[37]See Lindley, Companies (6th ed., 1902) 2, 362; 1 Mor. Priv. Corp. (2nd ed., 1886) sec. 8.

[38]The different kinds of statutory individual liability imposed on stockholders are conveniently classified in 26 Am. & Eng. Encyc. of Law (2nd ed., 1904) 1017.

For present purposes, however, it will suffice to discuss only three of these classes. (a) First, there is the case of a corporation organized and doing business in a jurisdiction under the law of which each stockholder has what may be called, for reasons to appear, a general, unlimited, individual liability. (b) Second, we may be dealing with a corporation organized and doing business in a jurisdiction where the so-called "common law" rule prevails. By this rule stockholders who have fully paid up the par value of their shares have no liability to creditors other than such as constitutes a charge against their respective, undivided, proportional interests in the corporate assets.[39] This sort of limited liability may, for reasons about to appear, be called the special, proportional, corporate (or quasi-joint) liability of the stockholder. For present purposes the most important example of this second class of corporations is the usual English limited company, such as the Copper King, Limited. (c) Third, there is the corporation organized and doing business in a jurisdiction where by statute, along with the special corporate (or quasi-joint) liability just referred to, there results what may be called a general, proportional (or otherwise limited) individual (or several) liability. The ordinary California corporation is, for present purposes, the most important example of this third sort of liability. Each of the three kinds of liability may now be considered somewhat separately.

(a) *The general, unlimited, individual liability of stockholders.* With reference to a given corporation contract we commonly say that the contractual obligation exists between the corporation and the other contracting party, that the primary duty is on the corporation, not the stockholders; that in case of breach the remedial contractual duties and contractual liabilities are on the corporation, not the stockholders; that the corporation is sued, not the stockholders; that the judgment is against the corporation, not against the stockholders; that the execution is levied on the property of the corporation, not on that of the stockholders. All this is our usual language. It is short and convenient, but that is all. If we look at the ultimate realities, we see that, as to each of the three classes of corporations above mentioned, the only primary obligation in existence is between the stockholders and the other party to the bargain, and that the primary duties are upon the stockholders. As said by Judge Dillon:[40]

[39]See Carrol *v.* Green (1875) 92 U. S. 509, 512; 2 Mor. Priv. Corp. (2nd ed., 1886) 869.

[40]Upton *v.* Englehart (U. S. 1874) 3 Dill. 496, 497.

*"Whoever becomes a stockholder in an incorporated company sustains a three-fold relation: * * * third, to the creditors of the corporation.* * * * The capital is supplied by the shareholders, who alone participate in the gains or pecuniary advantages which may accrue from the carrying on of the corporate enterprise. *The shareholders are the real parties in interest; the incorporating statute empowering them to contract and be contracted with through the medium of a corporate representative."*

Accordingly, if the contract calls for a conveyance of land owned by the corporation, each stockholder is, along with his fellows, under a solidary,[41] primary duty that such land shall be conveyed; and, in case of breach, by reason of the equitable remedial duties and liabilities arising, specific performance may be had. If, on the other hand, the corporation contract (or debt) calls for the payment of money, each stockholder is likewise under a solidary, primary duty to the creditor. So, too, in every case, no matter what the forms and procedure may be, the action brought to enforce this liability is in truth "against the stockholders;" and the same may be said as to the judgment and the execution.[42] This is as true of the "limited liability" corporation as it is of any other.

Whether the stockholder's liability is limited or unlimited, and if the latter, to what extent—depends on the legislative enactment under which the association has transacted its business. The case now under discussion is that of an unlimited remedial duty and a correspondingly unlimited liability—a liability, that is, to respond out of any assets that the stockholder may have. Corporations, the transactions of which give rise to liabilities of this kind, have

[41]Compare Salmond, Jurisp. (2nd ed., 1907) 430: "Obligations * * * may be called solidary, since, in the language of Roman law, each of the debtors is bound *in solidum* instead of *pro parte*; that is to say, for the whole, and not for a proportionate part. A solidary obligation, therefore, may be defined as one in which two or more debtors owe the same thing to the same creditor."

[42]That the form of a judgment and the procedure for obtaining it vary considerably according to circumstances, and that the actual incidence of the judgment obligation may be different from that which the form might *prima facie* indicate is well exemplified by such cases as Bank of Australasia *v.* Harding (1850) 9 C. B. 661. In that case an "unincorporated" company did business in New South Wales. The legislature passed an act enabling the chairman of the company to sue and be sued for the company, and providing that he was to be taken as agent for the members of the company. An action in the court of New South Wales was brought against the chairman, as such, and judgment obtained against him in that capacity. Thereafter it was held by the English court that such judgment could, to its full amount, be enforced in England against a member of the company resident in England, although he was not, except by representation as above described, a party to the proceedings in New South Wales.

existed both under the law of England and under the laws of some of the American states. Thus under the English Act of 1844[43] companies could be "incorporated" with all the usual incidents excepting limitation of liability. So also under the present English Companies Acts, 1862-1908,[44] "unlimited liability" corporations, or "companies" may be formed, though they are now unusual.[45] In America also, as is well known, there are cases of "unlimited liability" corporations. Thus in *Corning* v. *McCullough*[46] the charter of an incorporated company provided that the stockholders should be jointly and severally liable for its debts and that a creditor might, after judgment obtained against the corporation, and execution returned unsatisfied, sue any stockholder and recover his demand. Mr. Justice Jones, in the course of an able opinion, said:[47]

"If then the incorporation of this company does not shield or exempt its corporators and members from individual responsibility for the debts * * * but leaves them, under the common law liability, as partners or joint debtors for those debts and engagements, must it not follow that the defendant, McCullough, he being a stockholder * * * at the time of the debt * * * to these plaintiffs was contracted, became, on the consummation of the contract by the delivery of the goods to the company, liable for the

[43]Stat. 7 & 8 Vict. c. 110. This act, sections 66 and 68, enabled "parties who had recovered on a general contract with the company * * * to enforce a judgment against the company by execution against the individual members of it, after due diligence used to obtain satisfaction from the funds of the company." Denman, C.J., in Halket *v.* Merchant, etc., Ins. Co. (1849) 13 Q.B. 960, 963. It thus appears that under this Act of Parliament the judgment "against the company" was the substantial equivalent of an ordinary joint judgment, the most conspicuous difference being perhaps the fact that, before execution could be levied on the general, individual assets of the shareholders, their special, corporate (or quasi-joint) assets had to be exhausted.

[44]See sec. 38, quoted *ante*, p. 286, n. 4. The fact that this unlimited liability can be enforced only by winding-up proceedings involves merely a difference of form and not of substance. Compare Oakes *v.* Turquand (1867) L. R. 2 H. L. 325, 347, *per* Lord Chelmsford: "As I understand these Acts," (relating to contribution by shareholders in winding-up proceedings) "they merely changed the remedy which the creditor previously possessed of issuing execution against the shareholder * * * into a right to obtain satisfaction of his debt by means of forced contributions. * * * They do not appear to me to have changed the right of the creditor on the one hand, or the liability of the shareholder on the other. * * *"

[45]See also the Companies Act of 1862, secs. 41, 43, and 48, relating to an unlimited individual liability existing, in certain cases, even against shareholders in a company limited by shares.

[46](1847) 1 N. Y. 47. Compare Mr. Taylor's comments on this case, Priv. Corp. (5th ed., 1902) sec. 717.

[47]At page 54.

payment of the debt contracted thereby? * * * * *each stockholder incurs that liability to the creditor the moment the contract of such creditor with the company is consummated * * * the defendant incurred the obligation to answer and pay the debt thus contracted."* [48]

From the quotation just given it becomes clear that, so far as the primary obligation, the remedial obligation, and the corresponding liability were concerned, the corporation obligation in *Corning* v. *McCullough* differed from an ordinary joint and several obligation only in comparatively unimportant details.[49] Some of the differences were these: (1) that the corporate (or quasi-joint) liability of the stockholders could be enforced by suing them in the name of the corporation, instead of joining them all as individual parties defendant; (2) that, as to the corporate (or quasi-joint) judgment rendered, execution could be levied only on the special, corporate (or quasi-joint) assets of the stockholders, and not on their general, individual assets as in the case of an ordinary joint judgment; (3) that the individual liability of each stockholder could be enforced only after the writ of execution on the corporate (or quasi-joint) judgment had been returned unsatisfied.

(b) *The special, proportional, corporate (or quasi-joint) liability of stockholders.* Attention must now be given to that sort of limited liability which is most generally associated with the idea of a corporation. Suppose that an English limited company, such as the Copper King, Limited, having its shares fully paid up, incurs a debt in England. As already suggested, the primary obligation here, as in all other cases, exists between the creditor and the shareholders or stockholders, the incidents of this obligation being worked out, so far as possible, *as if* the stockholders were a single person. In short, the primary obligation is a solidary one similar in many respects to an ordinary joint obligation. The most important difference between the two cases is this: Upon breach of an ordinary joint obligation, all the joint obligors must be made parties defendant, a joint judgment may be obtained, and execution may be levied not only on such special, joint assets as the joint obligors may chance to have, but also on the general, several assets of each obligor. On the other hand, if the corporate (or quasi-joint) debt of the stockholders is special and proportional, under

[48] For a few further examples of corporations the stockholders of which incurred an unlimited individual liability, see Deming *v.* Bull (1835) 10 Conn. 409, 414; Shafer *v.* Moriarty (1874) 46 Ind. 9; New Eng., etc., Bank *v.* Newport, etc., Factory (1859) 6 R. I. 154. See also, *ante*, p. 304, n. 43.

[49] See *ante*, p. 295, the quotation from Mechem on Partnership.

forms and methods of procedure that are *sui generis,* a corporate (or quasi-joint) judgment may be obtained against the stockholders; but, in contrast to the ordinary joint judgment, satisfaction of this corporate judgment may be levied not on the general assets of each stockholder, but only on the special, corporate (or quasi-joint) assets in which each stockholder has an undivided, proportional interest. At this point another important difference between the corporate (or quasi-joint) obligation of stockholders and the ordinary joint obligation should perhaps be noticed. Both as to the primary obligation resulting from a corporation contract and as to the supervening remedial obligation and judgment obligation—together with the corresponding liability—any stockholder may, by merely selling his shares, that is, his undivided, proportional interest in the corporate assets, substitute his transferee. This novation, even though it involves a transfer of obligation or liability as well as the rights of the stockholder, may take place, of course, without the consent of the creditor of the corporation.

(c) *The general, proportional (or otherwise limited), individual liability of stockholders.*—The third case of stockholders' liability to be considered might be said to be intermediate between the two cases, "(a)" and "(b)," previously discussed. For present purposes, as has already been said, the best example of that liability is furnished by an ordinary California corporation doing business in that state.[50] As will soon appear, this sort of liability is neither so extensive as that discussed in connection with the case of *Corning* v. *McCullough* nor so restricted as that of the shareholders in an English limited company such as the Copper King, Limited. The latter form of liability has, in the paragraphs preceding, been compared with the liability resulting from an ordinary joint obligation; and, in a similar way, it seems extremely helpful to compare the obligations and liabilities of California stockholders with ordinary joint and several obligations and liabilities.[51] Let us suppose that on March 1st the XYZ corporation, the shares of

[50]For the California constitutional and statutory provisions relating to the individual liability of stockholders, see the quotations *ante,* p. 286, n. 7.

[51]See Leake, Contracts (5th ed., 1906) 301: "Several persons may also enter into concurrent contracts respecting the same matter, binding themselves *jointly* as one party, and also *severally* as separate parties; in which case, besides the one joint contract, there are also as many several contracts as there are separate parties; the debt or matter of the contract being one and the same in all the contracts thus made." See also the similar language of Baron Parke in King *v.* Hoare (1844) 13 M. & W. 493, 505; and compare Mr. Justice Story in U. S. *v.* Cushman (1836) 2 Sumn. 426, 437.

which have been fully paid up,[52] incurs, in favor of A, a debt of $800, to be paid on June 1st. X owns half of the entire subscribed capital stock, Y and Z each one eighth, and the other stockholders the balance. By virtue of this debt X, Y, Z, and the others have a corporate (or quasi-joint) obligation corresponding to that of shareholders in an English limited company as heretofore explained; concurrently, however, each stockholder has, under the California law, a several, primary obligation. Accordingly, in case the debt is not paid at maturity, the stockholders have both a corporate (or quasi-joint) remedial obligation together with the corresponding liability, and a several remedial obligation, together with the corresponding liability. This obligation and this liability, however, though requiring the stockholder to respond out of his general, individual assets, are limited according to his respective proportion of the capital stock. For example, X's remedial obligation and liability amount to only $400, Y's to $100, and so on. From what has just been stated, it follows that A has a choice of remedies.[53] He may enforce the corporate (or quasi-joint) liability of the stockholders by "suing the corporation" and getting judgment for $800; and this judgment may be satisfied out of the special, corporate (or quasi-joint) assets of the stockholders. Instead of pursuing this course, however, A may enforce the several liability of X, Y, Z, or any of the other stockholders. *Without taking any proceedings whatever "against the corporation,"* or concurrently with such proceedings, he may, independently of any other creditor, institute an action at law against X for

[52]It should perhaps be said, in passing, that, when the shares have not been fully paid up, as a remedy concurrent with that given by Cal. Civ. Code, sec. 322 (relating to the individual liability), the judgment creditors of an insolvent commercial corporation may, in accordance with the generally prevailing doctrine, compel the shareholders, through an equitable proceeding, to pay in the unpaid portion of the par value of their respective shares. Harmon *v.* Page (1882) 62 Cal. 448; Tulare Savings Bank *v.* Talbot (1900) 131 Cal. 45.

[53]Compare the analogous doctrine as to choice and cumulation of remedies for breach of an ordinary joint and several obligation. In U. S. *v.* Cushman (1836) 2 Sumn. 426, 440, Mr. Justice Story said: "When a party enters into a joint and several obligation, he in effect agrees, that he will be liable in a joint action, and to a several action for the debt; and if so, then a joint judgment can be no bar to a several suit, if that judgment remains unsatisfied. The defect of the opposing argument is, that it supposes, that the obligee has an election only of one remedy, or of the other; and that by electing a joint suit, he waives his right to maintain a several suit. * * * The remedies are concurrent. And I know of no principle of law, which would have prevented the plaintiffs from bringing a joint suit and a several suit on the bond at the same time, and proceeding therein *pari passu.* It is true, there could be but one satisfaction."

$400; a similar action against Y for $100, and so on.[54] This last statement is supported not only by the unequivocal language of the California Civil Code but also by numerous decisions. Thus in *Morrow* v. *Superior Court*[55] Mr. Justice Sharpstein said:

"it seems to us that any creditor is entitled to sue any stockholder for such proportion of the indebtedness of the company to such creditor as the stock of such stockholder bears to the whole capital stock of said company. The stockholder is made *individually,* not *jointly,* liable. * * *

"As to the primary liability of the stockholders of the company, for its debts, we entertain no doubt * * * there is nothing in the act which postpones a creditor's right of action against a stockholder, until after he has exhausted his remedies or any part of them against the company for the recovery of his debt. *The liability of the stockholder is, in our opinion, as distinct and separate from that of the corporation, as it would be if the act had made no provision for any other liability than that of the stockholders for the debts of the company.*" [56]

At this point it should be observed that, even in the case of a California corporation incurring a debt in that state, it is possible for the stockholders to be exempted from any individual, or several, obligation and liability, and thus to have only a corporate (or quasi-joint) obligation and liability, just as in the case of an English limited company incurring a debt in England. By actual agreement with the corporation at the time the debt is contracted, the creditor may "waive" the individual obligation and liability of the stockholders.[57] Thus upon final analysis the difference

[54]Or X and some of the other stockholders may be joined in a single action, for the purpose of enforcing their respective several liabilities, the judgments rendered in such case being, however, several, not joint. See Cal. Civ. Code, sec. 322.

[55](1883) 64 Cal. 383, 386.

[56]See, to the same effect, In re California, etc., Ins. Co., (1889) 81 Cal. 364, 368; Hyman *v.* Coleman (1890) 82 Cal. 650, 653; Knowles *v.* Sandercock (1895) 107 Cal. 629, 642; Anderson *v.* Schloesser (1908) 153 Cal. 219, 222.

Those stockholders only are liable who were such at the time that the corporate obligation was incurred. See the cases just cited.

[57]French *v.* Teschemaker (1864) 24 Cal. 518, 559; see Wells *v.* Black (1897) 117 Cal. 157, 161-163. The doctrine of these cases is the one which prevails generally in the American States. See 1 Cook, Corp. (5th ed., 1903) sec. 216, n. 1.

Similarly, under the English Companies Acts. 1862-1908, the individual liability of shareholders in an "unlimited liability" company may be negatived by actual agreement that the creditor shall look to the company funds only. See sec. 38, clause 6; In re Accidental, etc., Co. (1878) L. R. 7 Ch. D. 568, 570; compare Halket *v.* Merchant, etc., Ins. Co. (1849) 13 Q. B. 960, referred to, *ante,* p. 304, n. 43.

between the English and the California law as to limitation of liability is not great. By the former it sufficies that "Limited" is the last word in the name of the company as set forth in the memorandum of association, that there is a declaration in the memorandum that the liability of the members is to be limited, and that certain provisions of the law are followed requiring the word "Limited" to be used as part of the company name in all business transactions.[58] By the California law, on the other hand, nothing short of an actual agreement by the creditor seems to suffice.[59]

Only one further important question relating to the intrinsic nature of the obligation and the liability of stockholders remains to be considered: Are they contractual, or are they quasi-contractual? In considering this question one preliminary matter may be noticed. It seems well to remember that the term to be applied to any sort of liability depends upon the nature of the primary obligation from the breach of which that liability arises. Thus, as heretofore indicated,[60] the primary obligation resulting from an ordinary legally binding agreement is said to be contractual; in case of breach, the remedial obligation to pay damages is likewise designated as contractual; and, finally, the liability corresponding to that remedial obligation is also properly described as contractual. Similarly a quasi-contractual liability corresponds to a remedial obligation springing from the breach of a quasi-contractual primary obligation.

In approaching the present inquiry as to the precise character

[58]See the Companies Act of 1862, secs. 8, 41, 42.

[59]Wells *v.* Black (1897) 117 Cal. 157, 162: In this case the California corporation was a savings-bank. In the plaintiff's deposit-book, as in those of the other depositors—was printed, along with the by-laws of the corporation, an additional by-law, so-called, the latter being in the form of an agreement couched in the first person, and purporting to waive any constitutional or statutory liability of the stockholders. This waiver was not, however, signed. It was held: (1) that the so-called by-law was void as such; (2) that as there was no avowed agreement to its terms, the stockholders' obligation and liability had not been negatived. Said Mr. Justice Henshaw: "Had the depositors signed this, or in any other equally effective manner agreed to its terms, a different question would be presented. * * * Nor is the position of appellants bettered if the provision above quoted be treated as a by-law. It would then be a by-law asserting that the stockholders of this corporation were not held to their constitutional liability. But corporations may make only such by-laws as are consistent with the constitution and laws of the state. * * * Such a by-law clearly contravenes them, and is therefore void. Being void, it carried no notice to and had no binding force upon depositors." Compare Oswald *v.* Minneapolis, etc., Co. (1896) 65 Minn. 249.

[60]See *ante*, pp. 293-4.

of the stockholder's liability it seems important to have in mind more definitely than has already been incidentally indicated the true relation existing between the stockholders and the corporation officers and agents. It is of course common, in connection with most matters of corporation law, to say with some emphasis that the corporation officers and agents are the agents "of the corporation," and not of the stockholders. But whenever it is desired to get down to the realities of the situation, it is necessary to perceive clearly that the so-called corporation representatives are in fact the representatives, or quasi-agents, of the stockholders, and that all forms of stockholders' obligations and liabilities, special or general, quasi-joint or several, limited or unlimited, result from that relation. This fact has received ample recognition from the courts. A good case relating to the matter is *Kennedy* v. *California Savings Bank*.[61] By section 537 of the California Code of Civil Procedure an attachment could be had in an action "upon a contract, express or implied, for the direct payment of money." It was held that the individual obligation and liability of the stockholders under section 322 of the Civil Code were contractual within the meaning of the above provision. Mr. Justice De Haven said:

"This section prescribes the terms upon which individuals are permitted to transact business through the medium of a corporation, * * * As said by the Supreme Court of Ohio, in *Brown* v. *Hitchcock*, 36 Ohio St. 678: 'The corporation itself is a mere legal entity, existing only in legal contemplation, and is created for the convenience and benefit of the stockholders. All its dealings are for and on their account. *It can contract no debts, except under the authority, express or implied, of the stockholders, and through their corporate agents.*"

This relation between the stockholders and the corporate agents is also justly emphasized in *Hale* v. *Hardon*,[62] another case relating to the individual liability of stockholders. Judge Aldrich, speaking for the United States Circuit Court of Appeals, said:

"The stockholders in the primary and in the ultimate sense are the corporation. * * * The business is the business of the stockholders, and the profits, where there are profits, belong to the stockholders. *The officers and agents of the corporation who deal with the public are, in a sense at least, the agents of the stockholders, and the superadded stockholders' liability is designed as an*

[61] (1892) 97 Cal. 93, 96.

[62] (1899) 95 Fed. Rep. 747, 752.

additional security and as an inducement to the public to deal with the enterprise in which the stockholders are engaged." [63]

The relation between the stockholders and the corporation representatives having been considered, the question arises: What is the intrinsic nature of the obligation and the liability ultimately falling upon the stockholders as a result of that relation? To answer this question, let us consider in turn: (1) the corporate (or quasi-joint) obligation and liability of the stockholders; and (2) the individual (or several) obligation and liability. No doubt, with respect to a given "corporation contract" we commonly say that "the corporation made the contract;" and hence we say also that "the corporation's obligation and liability" are contractual. But, as we have seen, the corporation's obligation and liability are in reality the corporate (or quasi-joint) obligation and liability of the stockholders. In the most general sense of the term it would seem that this obligation and this liability are contractual. It may be doubted, however, whether this is as precise a statement as is possible.[64] In this connection it seems necessary to consider one or two elementary propositions relating to corporation control. The language of Mr. Taylor will suffice:

"By filing articles of association, or accepting a charter, shareholders agree" (that is, *inter se*) "that the corporate enterprise shall be managed as provided for in the charter, or in the enabling statute and articles of association. Their individual right to manage the funds subscribed they surrender into the hands of a majority of themselves, and into the hands of the officers of the corporation, as provided for in the constitution."[65]

"As a usual thing, the entire management of the business of a corporation is by its constitution vested in the board of directors; so that from the beginning the shareholders have little to do with the corporate management, their main function being to elect the directors." [66]

"As against all persons, so against the individual shareholders,

[63]Compare also the recent article of Professor W. D. Lewis, Liability of the Undisclosed Principal in Contract (Feb., 1909) 9 COLUMBIA LAW REV. 116, 128, quoted, *ante*, p. 301, n. 35.

[64]See Harriman, Contracts (2nd ed., 1901) Appendix I., "The Nature of the Contractual Obligation." At page 367 the learned author says: "The two essential features of contractual obligation, therefore, are, first, that it is the result of a voluntary act on the part of the obligor; *and, second, that this voluntary act determines the extent of the obligation and all conditions necessary to its existence.*"

See also Keener, Quasi-Contracts (1893) Ch. I.

[65]Priv. Corp. (5th ed., 1902) sec. 38.

[66]*Ibid.* sec. 219.

or a minority of shareholders, the corporation has the right to carry on the corporate enterprise in the manner and for the purposes set forth in its constitution; and within the scope of their powers the reasonable and fair discretion of the board of directors can be controlled, if at all, only through the action of a majority of shareholders taken in the manner indicated by the corporate constitution." [67]

From these well-known principles of law it is clear that the stockholder, by joining the corporation, grants, within the limits defined by the constitution, an irrevocable power to the corporation "agencies" to fix upon himself, or the one succeeding to his interest, the corporate (or quasi-joint) primary obligation now under discussion, and also, in case of breach, the corporate (or quasi-joint) remedial obligation, and corresponding thereto the special, proportional, corporate (or quasi-joint) liability. In the creation of this corporate (or quasi-joint) obligation against a stockholder, X, and in favor of a creditor, A, there may, so to speak, intervene the will and the powers of a majority of the stockholders, the will and the powers of the board of directors, and the will and the powers of some agent upon whom a certain authority has been conferred. Over and over again, therefore, the obligation of X and the other stockholders may come into existence without their actual concurrence, and, in some cases, in spite of their express dissent and minority vote. Further, even if X expressly yields his assent to a contemplated corporate obligation and votes with the majority, the obligation thereafter fixed upon him and his fellows results not from his voluntary act alone or from the exercise of his individual power alone; on the contrary, it results from the volitions, and the concurrent exercise of the rights and powers, of a majority of the stockholders and the corporate officers and agents whose will may be involved.[68] The obligation and liability of X, in other words, grows out of the relation which he has, by joining the corporation, voluntarily constituted between himself and his fellow-stockholders. In view of the foregoing considerations, the obligation and liability in question may, perhaps, be

[67] *Ibid.* sec. 553. The learned author quotes the excellent statements of Lindsay, J., in Dudley *v.* Kentucky High School (Ky. 1873) 9 Bush 576, 578, and that of Bidelow, C. J., in Durfee *v.* Old Colony R. Co. (Mass. 1862) 5 Allen 230, 242.

[68] Of course only the typical case is here considered; the case of a single person owning a majority of shares of stock is exceptional and, for present purposes, unimportant.

accurately described as quasi-contractual rather than contractual.[69] If, however, the former term be thought inadequate, or otherwise objectionable, it would seem that we must content ourselves by describing the obligation and liabilty as *sui generis.*

All that has been said, in the few paragraphs immediately preceding, with respect to the corporate (or quasi-joint) obligation and liability would appear to apply with equal force to the individual (or several) obligation and liability of a stockholder in a California corporation. The latter as well as the former are generally described as contractual; yet in strictness they seem to be quasi-contractual. So far as authority is concerned, there are many judicial opinions asserting that the individual obligation and liability are contractual; but in a few cases judges have given intimations of the view here urged as more precise. Some of the more important authorities will now be referred to.

The California case, *Kennedy* v. *California Savings Bank,*[61] has already been noticed for a somewhat different purpose;[70] and it may be remembered that the court there held that the individual liability of the California stockholder was contractual within the broad meaning of the code section relating to attachments. There are a number of other California cases of similar import, that is, that the liability is contractual in the broad sense of that term.[71]

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[69]See Harriman, Contracts (2nd ed., 1901) Appendix I., quoted *ante,* p. 311, n. 64; Keener, Quasi-Contracts (1893) Ch. I.

However remote the analogy may at first seem, it is believed to be helpful to compare the stockholder's obligation with that of a husband for necessaries furnished, under certain circumstances, to his wife. In such a case the wife has the power, by virtue of the relation between herself and husband, to fix the obligation upon the latter, quite independently of any agreement or assent on his part. So, in like manner, the liability of the stockholder grows out of the relation which he has voluntarily constituted between himself and his fellow-stockholders.

It seems helpful, also, to compare the obligation of an undisclosed principal. It may well be thought that this is quasi-contractual rather than contractual, at least according to the more usual modern sense of the latter term. Compare Huffcut, Agency (2nd ed., 1901) secs. 118-121; Professor W. D. Lewis, Liability of Undisclosed Principal in Contract (Feb., 1909) 9 COLUMBIA LAW REV. 116. This suggestion as to the nature of the undisclosed principal's obligation would seem to have peculiar force as applied to a case like Watteau *v.* Fenwick L. R. [1893] 1 Q. B. 346.

[70]*Supra,* p. 310.

[71]Mokelumne, etc., Co. *v.* Woodbury (1859) 14 Cal. 265, 267; McGowan *v.* McDonald (1896) 111 Cal. 57, 71; Bliss *v.* Sneath (1898) 119 Cal. 526, 530. See also Ferguson *v.* Sherman (1897) 116 Cal. 169, 176 (holding that the stockholders' liability under the laws of Kansas was "contractual" and that an action to enforce it might be maintained in California).

One of the best statements is to be found in *Mokelumne Hill, etc., Co.* v. *Woodbury.*[72] In delivering the opinion of the court, Mr. Justice Cope said:

"It would seem * * * that an individual corporator, in respect to his personal liability for the debts of the corporation, does not occupy the position of a surety, but that of a principal debtor. His responsibility commences with that of the corporation, and continues during the existence of the indebtedness. * * * It has frequently been decided that the members of a corporation, who are answerable personally for the corporate debts and liabilities, stand in the same position, in relation to the creditors of the corporation, as if they were conducting their business as a common partnership."

In *Aldrich* v. *Anchor Coal, etc., Co.,*[73] the question before the Supreme Court of Oregon was whether an action could be maintained in that state to enforce a stockholder's liability arising under section 322 of the California Civil Code. In reaching an affirmative conclusion, the court, by Mr. Justice Bean, said:

"It will thus be seen that the liability of a stockholder in a California corporation is, by the statute and decisions of that state, a liability in the nature of a contract, the same in legal effect as if he had separately and directly contracted with a creditor to pay such proportion of his claim as the amount of his stock bears to the whole subscribed capital stock. * * * "[74]

The cases just referred to relate directly to the stockholders' individual liability under the laws of California. The views expressed by these authorities find abundant support in a large number of cases deciding that the individual liability arising under the laws of various other states is contractual in the broad sense of that term. *Whitman* v. *Oxford National Bank,*[75] before the Supreme Court of the United States, is one of the best-known and most frequently cited cases on this subject. The question was whether an action could be maintained in one of the United States

[72](1859) 14 Cal. 265, 267.

[73](1893) 24 Or. 32, 37, 32 Pac. Rep. 756.

[74]*Accord:* Lanigan *v.* North (1901) 69 Ark. 62 (holding that the stockholders' individual liability under the law of California was "contractual," and might be enforced in the courts of Arkansas).

It should be remembered that, although some of the cases cited in this article involve a question in the conflict of laws, they are not referred to at this time by reason of that specific fact; they are noticed merely because of their bearing on the nature of the individual liability. As already indicated, the various questions relating to the conflict of laws will be discussed in a subsequent article.

[75](1900) 176 U. S. 559, 563.

Circuit Courts of New York to enforce the individual liability of a stockholder in a Kansas corporation. In holding that the action might be maintained, Mr. Justice Brewer, speaking for the court, said:

"The liability which by the constitution and statutes is thus declared to rest upon the stockholder, though statutory in origin, is contractual in its nature. It would not be doubted that if the stockholders in this corporation had formed a partnership, the obligations of each partner to the others and to creditors would be contractual, and determined by the general common law in respect to partnerships. If Kansas had provided for partnerships, with limited liability, and these parties, complying with the provisions of the statute, had formed such a partnership, it would also be true that their obligations to one another and to creditors would be contractual, although only in the statute was to be found the authority for the creation of such obligations. And it is none the less so when these same stockholders organized a corporation under a law of Kansas, which prescribed the nature of the obligations which each thereby assumed to the others and to the creditors. While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute." [76]

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[76] In accord with Whitman *v.* Oxford Nat. Bank are the following cases holding that the individual liability of stockholders is "contractual," and that an action to enforce it is transitory: Flash *v.* Conn (1883) 109 U. S. 371; Bernheimer *v.* Converse (1907) 206 U. S. 516, 529; Rhodes *v.* U. S. Bank (1895) 66 Fed. Rep. 512; McVickar *v.* Jones (1895) 70 Fed. Rep. 754; Mechanics, etc., Bank *v.* Fidelity, etc., Co. (1898) 87 Fed. Rep. 113; Dexter *v.* Edmands (1898) 89 Fed. Rep. 467; Hale *v.* Hardon (1899) 95 Fed. Rep. 747; Lanigan *v.* North (1901) 69 Ark. 62, 63 S. W. 62; Ferguson *v.* Sherman, *supra;* Bell *v.* Farwell (1898) 176 Ill. 489, 497; Pulsifer *v.* Greene (1902) 96 Me. 438, 446; Hancock Nat. Bank *v.* Ellis (1898) 172 Mass. 39, 47; Broadway Nat. Bank *v.* Baker (1900) 176 Mass. 294, 295; Converse *v.* Ayer (Mass. 1908) 84 N. E. Rep. 98, 99; Bearse *v.* Mabie (Mass. 1908) 84 N. E. Rep. 1015; Western Nat. Bank *v.* Lawrence (1898) 117 Mich. 669, 672; First Nat. Bank *v.* Gustin, etc., Co. (1890) 42 Minn. 327; Guerney *v.* Moore (1895) 131 Mo. 650; Howarth *v.* Angle (1900) 162 N. Y. 179, 187; Kulp *v.* Fleming (1901) 65 Oh. St. 321, 338; Blair *v.* Newbegin (Oh. 1902) 62 N. E. Rep. 1040, 1043; Aldrich *v.* Anchor Coal Co., *supra;* Cushing *v.* Perot (1896) 175 Pa. St. 66.

The case of Flash *v.* Conn, *supra*, was cited with approval in the English cases, Huntington *v.* Attrill L. R. [1893] A. C. 159, 160; *per* Lord Watson; Risdon, etc., Co. *v.* Furness L. R. (1905) 1 K. B. 304, 314, *per* Kennedy, J., *semble.*

With the foregoing authorities should be compared those holding that the individual obligation and liability of stockholders fall within Art. I., sec. 10, of the Constitution of the United States, providing that "no state shall * * * pass any * * * law impairing the obligation of contracts." Bernheimer *v.* Converse (1907) 206 U. S. 516, 530; Knickerbocker Trust Co. *v.* Cremen (1905) 140 Fed. Rep. 973; Walterscheid *v.* Bowdish (Kan. 1908) 96 Pac. Rep. 56.

The authorities exemplified[77] by the case just quoted from are those asserting that the individual obligation and liability of a stockholder are, in the broad sense of the term, contractual; and in this the writer is ready to acquiesce. As already indicated, however, according to the more precise use of terms, the obligation and liability appear to be quasi-contractual rather than contractual. At this point, therefore, it seems desirable to direct attention to those authorities that more or less definitely lend support to this conclusion. In *Hancock National Bank* v. *Farnum*,[78] as in *Whitman* v. *Oxford National Bank*, the case last quoted from, the question was whether an action to enforce the stockholder's individual liability under the Kansas law was transitory. In deciding this question in the negative, the court, by Mr. Justice Stiness, said:

"We come, then, to the question whether we can construe the statute of Kansas to create a contractual relation. However much the provisions which make a stockholder liable for debts of a corporation may differ in the several States, they are essentially the same in principle. They declare a liability and provide for its enforcement. * * * Certainly the ordinary elements of a contract are wanting. The minds of the stockholder and the corporation creditor have not met upon the subject-matter of the original debt; no credit has been given to the stockholder directly; he has not directly received the consideration, nor has he made a promise, express or implied. There is nothing between them which at common law would be regarded as a contract. But the statute imposes a liability upon grounds of equity and public policy. * * * We are aware that the greater number of cases call the liability a contract, and undoubtedly, the relation of a stockholder to a corporation has certain equitable features both of

[77]In connection with the last sentence from Mr. Justice Brewer's opinion, the writer is reminded of the fact that beginners in the law, by reason of the great emphasis which their studies place upon the common law as compared with statute law, are apt to think of statutory rights and duties as belonging to a category entirely distinct from contracts, quasi-contracts, and torts. This notion is of course a serious stumbling-block to clear thinking. Thus, if a statute were to provide that a promise in writing should be valid, even in the absence of both consideration and seal, we should have a statutory contract in the strictest sense of the term. Likewise, there are numerous instances of statutory quasi-contractual obligations. Compare *e. g.*, Mandell Bros. *v.* Fogg (1903) 182 Mass. 582, discussing an Illinois statute imposing upon the wife a liability for purchases made by the husband without her knowledge, in case they constituted part of the "expenses of the family." Finally, it would of course be easy to multiply instances of statutory rights the violations of which constitute torts. Compare, *e. g.*, the statutory recognition of the "right of privacy," N. Y. Laws, 1903, c. 132, abrogating Roberson *v.* The Rochester Folding-Box Co. (1902) 171 N. Y. 538, 556.

[78](1898) 20 R. I. 466, 470.

a contract and a guaranty; but we think it much more accurate to say that the liability is a statutory liability simply, incidental to the ownership of stock, than to say that it is a contract." [79]

In *Crippen* v. *Laighton*,[80] a case which likewise involved the Kansas statute, a similar decision was reached, Mr. Chief Justice Blodgett saying:

"Coming directly to the case in hand, the first inquiry (although not one of controlling importance) suggested by the views we have expressed is whether the liability sought to be enforced is statutory or contractual. It must, in fairness, be conceded that a majority of courts hold such a liability to be contractual; but to this doctrine we cannot assent. True, the defendant, by virtue of his ownership of five shares of the capital stock * * * became obligated to pay any unsatisfied judgment creditor of the corporation a sum not exceeding the par value of his shares. But how did he become obligated? Not by virtue of any contract, not because he expressly or tacitly agreed to be so obligated, but solely because the law of Kansas imposed the obligation upon him as a secondary and subsidiary liability for the corporation's debts."

It is difficult to escape from the reasoning in the above quotation; and at first glance it seems opposed to that of *Whitman* v. *Oxford National Bank* and the great number of similar decisions. Yet it can hardly be doubted that in all the latter cases the judges must have been cognizant of the obvious points mentioned by Mr. Justice Stiness; and, that being so, it would seem that the conflict of views is, after all, only apparent. The difference of opinion appears ultimately to be one of terms rather than of conflicting ideas as to the real nature of the liability in question. This mode of reconciling the two judicial attitudes finds illustration in the discriminating, though somewhat vague, language of Mr. Justice Day in *Bernheimer* v. *Converse*,[81] a comparatively recent case involving the nature of the stockholders' individual liability arising under the constitution of Minnesota. In speaking for the Supreme Court of the United States, the learned justice said:

"It may be regarded as settled that upon acquiring stock the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature and, as such, capable of being

[79] The actual decision in this Rhode Island case was reversed on constitutional grounds. Hancock Nat. Bank *v.* Farnum (1900) 176 U. S. 640, 644. This reversing decision did not directly involve the accuracy of the Rhode Island court's views as to the nature of the individual liability of stockholders.

[80] (1899) 69 N. H. 540.

[81] (1907) 206 U. S. 516, 529.

enforced in the courts not only of that State, but of another State and of the United States, *Whitman, &c.*, v. *Bank*, 176 U. S. 559, *although the obligation is not entirely contractual and springs primarily from the law creating the obligation.*" [82]

As is evident from this passage, the court recognizes the difficulty of calling the liability contractual in the strict sense; yet, as is usual in the cases bearing on the subject, the real nature of the liability is obscured, and the seeming conflict of opinion perpetuated, by reason of the failure to show affirmatively that the obligation and the liability are really quasi-contractual.[83] Direct judicial authority for the validity of this suggestion is not, however, entirely wanting. In *Post, etc., Co.* v. *Toledo, etc., R. Co.*,[84] a case involving the nature of the stockholders' individual liability under the law of Ohio, Mr. Justice Field, speaking for the Supreme Judicial Court of Massachusetts, said:

"*The obligation imposed by the statutes of Ohio upon the stockholders for the purpose of securing the payment of the debts of the corporation is quasi ex contractu.* It must be taken that

[82]For similar judicial opinions indicating that the individual liability of stockholders is not strictly contractual, and lending support to the conclusion that it is really quasi-contractual, see Fuller, C. J., McClaine *v.* Rankin (1905) 197 U. S. 154, 159 (liability of National Bank shareholders under Rev. Stat. sec. 5151); Harlan, J., Christopher *v.* Norvell (1906) 201 U. S. 216, 225 (same); Hammersley, J., dissenting, Converse *v.* Ætna Nat. Bank (1906) 79 Conn. 163, 64 Atl. Rep. 341, 347 (liability under Minnesota constitution); O'Brien, J., Marshall *v.* Sherman (1895) 148 N. Y. 9, 20 (same); O'Brien, J., Knickerbocker Trust Co. *v.* Iselin (1906) 185 N. Y. 54, 56 (liability under statutes of Maryland).

In McClaine *v.* Rankin, the first case cited, *supra*, by a vote of four to three, the court held that a proceeding to enforce the liability of a stockholder in a National Bank was not, within the meaning of the statute of limitations prevailing in the State of Washington, "an action upon a contract or liability, express or implied, which is not in writing * * *." Since, primarily, this case involves simply the interpretation of the statute, it may well be thought that the decision itself is quite consistent with that in Whitman *v.* Oxford National Bank (1900) 176 U. S. 559: discussed, *ante*, p. 314. Compare Beatty, C. J., in Bliss *v.* Sneath (1898) 119 Cal. 526, 530: "A liability may be at the same time a statutory and a contract liability—and so it has been held by this court with respect to the liability of stockholders. It is a statutory liability as to the statute of limitations (Moore *v.* Boyd (1887) 74 Cal. 167), and a contract liability as to the right of attachment (Kennedy *v.* California Sav. Bank (1892) 97 Cal. 93, 33 Am. St. Rep. 163) and as to the law defining the jurisdiction of justices of the peace. (Dennis *v.* Superior Court (1891) 91 Cal. 548.)"

[83]Compare the remarks of Holmes, J., in the same case, Bernheimer *v.* Converse (1907) 206 U. S. 516, 535: "I regret that the court has thought it unnecessary to state specifically what contract the stockholder is supposed to have made, as different difficulties beset the different views that might be taken."

[84](1887) 144 Mass. 341, 343.

all persons who become stockholders in an Ohio corporation know the law under which the corporation is organized, and assent to the liability which that law imposes upon stockholders, and that all persons who deal with the corporation rely upon the liability of the stockholders as security for the payment of whatever debts may be due them from the corporation."

If the purpose of this article has been accomplished, it must be evident that the writer has endeavored to make clear a number of essential preliminary matters relating to the recent English case, *Risdon Iron & Locomotive Works* v. *Furness.*[85] The decision involves, as of most immediate interest and practical importance, a question in the conflict of laws, that is to say: According to what law should be determined the stockholders' individual liability or non-liability for the debts of the corporation? Since, however, in considering a problem in the conflict of laws it is especially clarifying to eliminate legal fiction as far as possible and to see things as they really are, it has seemed desirable to discuss, as a preliminary matter, the intrinsic nature of stockholders' individual liability, considered exclusively with reference to the territorial law of a single jurisdiction. The purpose of this article, as a sort of foundation for that to follow, has of course determined the limitations upon its scope and also its points of special emphasis. Accordingly the discussion has involved only certain phases of stockholders' individual liability, considered with some attention to analysis, authority and historical development. As a result of that discussion the following conclusions are suggested: that a corporation is simply an association of natural persons organized and doing business under forms, methods and procedure that are *sui generis;* that all corporate transactions can be adequately understood and stated only in terms of the rights, powers, liberties, duties, liabilities, disabilities, etc., of the natural persons concerned; that, in the case of an ordinary "limited liability" corporation or company, such as the Copper King, Limited, it is the stockholders that are really subject to the only obligations existing in favor of corporation creditors; that such obligations and the liabilities resulting from a breach are really "quasi-joint" and quasi-contractual; that, so far as a California corporation is concerned, the obligation and liability are closely analogous to the ordinary joint and several

[85] L. R. [1905] 1 K. B. 304; affirmed, L. R. [1906] 1 K. B. 49. See *ante,* p. 285.

obligation and liability; that both the corporate (or quasi-joint) and the individual (or several) obligations and liabilities of the stockholders are quasi-contractual rather than strictly contractual; that the same is true of the stockholders' obligations and liabilities arising under the laws of various other American states.

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